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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 626

CENTRAL-ILLINOIS SECURITIES CORPORATION AND C. A. JOHNSON,

Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee, SECURITIES AND EXCHANGE COMMISSION, et al.,

Respondents.

No. 630

THE EQUITY CORPORATION,

Petitioner,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee, and the SECURITIES AND EXCHANGE COMMISSION, et al.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INTERIM BOARD OF DIRECTORS OF INTERNATIONAL HYDRO-ELECTRIC SYSTEM.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INTERIM BOARD OF DIRECTORS OF INTERNATIONAL HYDRO-ELECTRIC SYSTEM.

This brief is submitted on behalf of respondent Interim Board of Directors of International Hydro-Electric System (IHES) in opposition to petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit entered October 26, 1956 (R. 916). That judgment affirmed an order of the United States District Court for the District of Massachusetts (District Court)

entered April 23, 1956 (R. 891) granting an application by the Securities and Exchange Commission (Commission) for approval and enforcement of a plan for the reorganization of IHES filed by the Interim Board and approved under Section 11(b) of the Public Utility Holding Company Act of 1935 (the Act), 49 Stat. 803 (1935), 15 U.S.C. § 79a *et seq.*

Opinions Below

The opinion of the Court of Appeals (R. 905) and the order of the District Court (R. 891) are not reported. The Commission's opinion (R. 847) is Holding Company Act Release No. 13044, issued November 23, 1955.

Statutes Involved

In addition to the statutory provisions set forth in the petitions, Sections 3(a)(5) and 24(a) of the Act (see Appendix) are also pertinent.

Questions Presented

1. Whether the Securities and Exchange Commission has power under Section 11(b) of the Act to amend an order directing dissolution of a holding company previously issued by the Commission under that section and upheld on review.

2. Whether an order of the Commission approving a plan for compliance with the Act by continuance of a holding company as an investment company, without provision for approval of the plan by holders of two thirds of the Company's outstanding stock or for a withdrawal privilege, is supported by substantial evidence and is in accordance with the standards of the Act.

Statement

IHES is a Massachusetts voluntary association registered as a holding company under the Act. In 1942 the

Commission pursuant to Section 11(b) of the Act ordered IHES dissolved, *In the Matter of International Hydro-Electric System, et al.*, 11 SEC 888, and the Commission's order was upheld on appeal, *Todd* v. *S.E.C.*, 137 F. 2d 475 (6th Cir. 1943.) In 1943 the Commission, with the acquiescence of management, applied to the District Court under Section 11(d) of the Act to enforce compliance with the dissolution order. That Court took exclusive jurisdiction of IHES and its assets and in 1944 appointed Bartholomew A. Brickley (a respondent) Trustee of the Estate of IHES (R. 880-1).

In 1949 a Class A shareholder applied for modification of the 1942 dissolution order to permit continuance of IHES as an exempt utility holding company. By that time some progress had been made in bringing IHES into compliance with the Act. However, it still had substantial overdue debenture indebtedness and preferred stock with large arrearages, and owned utility properties not retainable under the Act. There was also conflicting evidence on the value to stockholders of continuing the Company. Accordingly, the Commission denied the application, *In the Matter of International Hydro-Electric System*, Holding Company Act Release No. 9535 (1949), and the denial was sustained on appeal, *Protective Committee for Class A Stockholders* v. *S.E.C.*, 184 F. 2d 646 (2d Cir. 1950).

Thereafter, the reorganization proceedings brought the Company to its present position, in which its only outstanding security consists of Class A stock, it has no domestic utility subsidiaries within the meaning of the Act, and it qualifies for an exemption under Section 3(a)(5) of the Act (R. 562-70; 857-60).

In June of 1953, the Trustee filed an amended plan outlining a program for the continuance of IHES as an investment company and providing for an election of directors. After the election, held in April of 1954, a stockholder group

headed by C. A. Johnson (one of the petitioners) challenged the outcome in the District Court. When such litigation threatened to delay progress on the investment company program, that Court on December 8, 1954 entered an order constituting an Interim Board of Directors for the purpose of representing stockholders before the Commission and the Court in the formulation of a definitive investment company proposal to implement the Trustee's amended plan (R. 559-61).

The Interim Board plan, as approved by the Commission and the Courts below, provides that IHES register as a closed-end, non-diversified investment company under the Investment Company Act of 1940, 54 Stat. 789 (1940), 15 U.S.C. § 80a *et seq.*; that it continue as a voluntary association under its present declaration of trust (with certain amendments for the benefit of shareholders and certain accounting adjustments); that the continuing company be permitted to retain present assets; and that it be exempted from the Act under Section 3(a)(5).

The Commission rejected the proposal of the petitioners that IHES be split in two by organizing a new company which would be "spun off" with a proportionate share of assets to petitioners and their associates. It also rejected their proposals that the Company be dissolved unless the holders of two-thirds of all outstanding shares should approve continuance and that dissenting shareholders be given the privilege of withdrawing their aliquot share of assets.

The Commission approved the Interim Board plan as an appropriate and a fair and equitable means of compliance with the Act and modified the 1942 dissolution order to the extent necessary to permit IHES to consummate such plan. (R. 847-79). The District Court adopted as its findings of fact and conclusions of law the findings and opinion

of the Commission (R. 891-9), and the Court of Appeals affirmed the order of the District Court (R. 916).

Argument

The petitions challenge a unanimous Commission decision, a District Court order adopting the Commission's findings and conclusions as its own, and a unanimous affirmance by the Court of Appeals with an opinion by Chief Judge Magruder declaring that it "clearly appears" that there was "ample evidence" to sustain the Commission's approval of the Interim Board plan (R. 913). The petitions fail to make the exceptional showing necessary to justify review by this Court of these concurring decisions of the Commission and the two lower courts.

The Commission's decision was plainly an appropriate exercise of its authority under the Act, and the case presents no conflict of decision, important federal question, or other reason for issuing a writ of certiorari.

1. *The decision below is clearly correct.*

The Commission has express statutory authority to modify Section 11(b) orders such as its 1942 dissolution order in this proceeding. Such authority is granted by the following provision of Section 11(b) of the Act:

> "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

A Section 11(b) order is an "expression of the Commission's view of what must be done to ensure compliance" with the Act, see *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 121. Congress has given the Commission power to modify such orders when, as here, changed circumstances

indicate that compliance can appropriately be achieved by means other than those originally prescribed by the Commission.

The Commission's authority to modify the dissolution order was not lost or limited by reason of court approval of that order. The above-quoted provision speaks of "any order," and this Court has recognized that the Commission retains authority to alter a Section 11(b) order even though such order has been approved on review, see *American Power & Light Co.* v. *S.E.C.*, *supra* at 121.

The 1943 affirmance of the dissolution order by the Court of Appeals for the Sixth Circuit, *Todd* v. *S.E.C.*, *supra*, simply eliminated a challenge to the Commission's order. Similarly, the fact that the Commission in 1943 invoked the jurisdiction of the District Court under Section 11(d) of the Act to enforce compliance with its order does not bar the Commission from modifying its order pursuant to statutory authority. The District Court's jurisdiction was invoked "to mobilize the judicial authority in carrying out the policies of the Act," see *S.E.C.* v. *Central-Illinois Securities Corporation*, 338 U.S. 96, 125. Now that the Commission finds that compliance with those policies can appropriately be achieved by continuing IHES as an investment company, the District Court's jurisdiction continues for the purpose of enforcing the Commission's modified order. Nor does the fact that the Court of Appeals for the Second Circuit upheld the Commission's refusal in 1949 to modify the dissolution order, *Protective Committee for Class A Stockholders* v. *S.E.C.*, *supra*, stand in the way of the present modification order. The 1949 proposal differed materially from that now approved (R. 859 n. 15) and the conditions of IHES bearing on the appropriateness of continuation have, as the court below observed, been "drastically altered" since 1949 (R. 913).

The Commission, on the basis of an extensive record, found the Interim Board plan to be an appropriate as well as fair and equitable means of compliance with the Act (R. 876-9). Conversion of a holding company into an investment company, rather than its dissolution, is unquestionably a method of compliance which the Commission may permit, see *General Protective Committee, etc.* v. *S.E.C.*, 346 U.S. 521, 530. Investment company continuation in place of liquidation has been approved by the Commission in several other instances,[1] and upheld on review, *Downing* v. *S.E.C.*, 203 F. 2d 611, 622 (D.C. Cir. 1953), *cert. den.* 346 U.S. 930. Indeed, before the Commission petitioners themselves espoused an investment company program which would also have involved modification of the dissolution order (R. 652, 654).

The courts below also correctly sustained the Commission's rejection of petitioners' contentions that the Interim Board plan could not be approved as fair and equitable without (1) conditioning the effectiveness of the plan on an affirmative vote by holders of two thirds of the outstanding shares, and (2) giving dissenting stockholders the privilege of withdrawing assets. The Act does not refer to a stockholder vote or withdrawal. Congress left the Commission free to determine in the light of its experience and the facts of particular cases whether either of these privileges would be an appropriate feature of a plan. Here the Commission has found, with ample support in the record, that neither of such procedures is required by fairness (R. 861-70).

The Commission has a statutory duty to determine whether a plan will effect compliance with the Act and its determination should not be subject, as petitioners pro-

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[1] *The United Corporation*, HCA Rel. No. 10164 (1951); *Electric Bond and Share Company*, HCA Rel. No. 11675 (1953); *Standard Power and Light Corporation*, HCA Rel. No. 13101 (1956).

pose, to a veto by shareholders. The petitioners' stockholder vote proposal runs counter to Commission policy announced in 1953 before the proceedings on the present plan began. At that time the Commission served notice that, because of its unsatisfactory experience with the delays and controversies attending stockholder votes in certain earlier cases, it did not favor voting provisions in a plan for conversion of a holding company to an investment company, see *Electric Bond & Share Company*, Holding Company Act Release No. 11675, p. 36 (summarized at R. 861-2). Here the Commission's rejection of a stockholder referendum is all the more reasonable because holders of 95 per cent of the Company's outstanding stock voted in the election for directors of a continuing company and, in doing so, implicitly approved the investment company objective (R. 862-3).

Additional considerations justify the Commission's refusal to grant a withdrawal privilege to dissenters. Under the plan, IHES will continue as a Massachusetts trust with no impairment of rights of shareholders. The proposed investment company operation is undeniably within the existing powers of the Company (R. 517, 595-6), and gives rise to no right of appraisal under state law (R. 915). In similar cases the Commission has held that fairness does not call for a withdrawal provision.[2] As the Commission points out (R. 865), there is even less reason for according withdrawal rights where the investment program is within the powers conferred by charter than in the many cases where reorganization plans substituting "equitable equivalents" for existing contract rights have been upheld without provision for withdrawal, see *e.g. Otis & Co.* v. *S.E.C.*, 323 U.S. 624. Furthermore, the Commission found that in this case a withdrawal provision would, in fact, be

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[2] See *Electric Bond & Share Company, supra* at 31-3; and *Standard Power & Light Corporation, supra* at 15.

unfair to non-withdrawing stockholders since it could well force them into a personal holding company situation with extremely damaging tax consequences to them (R. 868-70).

In sum, the Commission has here applied that "accumulated experience and knowledge which no court can hope to attain" and its "judgment is entitled to the greatest weight"; there is no basis for concluding that the remedy which it approved in the form of the Interim Board plan is "unwarranted in law" or "without justification in fact," see *American Power & Light Company* v. *S.E.C.*, *supra* at 112.

2. *No conflict of decisions is involved.*

The decision of the Court of Appeals is not, as petitioner in No. 630 contends, in conflict with its own prior decision in *Bailey* v. *Proctor*, 166 F. 2d 392 (1st Cir. 1948). In the *Bailey* case, the Court indicated that, without its leave, the District Court should not have entertained a motion to vacate an order for the dissolution of an investment company where such order had been affirmed on appeal and the mandate had issued to the lower court (166 F. 2d at 396).[3] But *Bailey* did not arise under the Act and did not involve review of an administrative order. The limitation on the power of a district court to alter its order after it has received the mandate of a court of appeals has no application to the authority granted to the Commission under the Act to modify its orders upon a showing of changed circumstances. This Court has warned against unthinking extension of the rules governing the relations between courts to the relations of administrative agencies and reviewing courts, see *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 140-44. The

[3] The Court of Appeals nevertheless proceeded to review the District Court's denial of the motion and reversed.

suggestion that *Pottsville* has no application because courts of appeal have a broader review authority under Section 24(a) of the Act than under the Radio Act of 1927, as amended, is unfounded; compare *American Power & Light Company* v. *S.E.C.*, *supra* at 112 and *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276.

The Court of Appeals' refusal to interfere with the Commission's determination that fairness does not require a withdrawal provision in the plan likewise does not conflict with other decisions. In *The United Corporation*, Holding Company Act Release No. 10614 (1951) p. 13, the Commission, in approving a Section 11(e) investment company plan wherein management voluntarily included a withdrawal offer, disclaimed any intent to hold that withdrawal was essential to fairness, and the Court's opinion sustaining the Commission's order does not discuss the withdrawal provision, see *Downing* v. *S.E.C.*, 203 F. 2d 611 (D.C. Cir. 1953). Similarly, in *Bailey* the Court of Appeals in approving a plan for reorganization of an investment company which permitted withdrawal did not find that such withdrawal was a condition of fairness essential to approval of the plan. In short, *Downing* and *Bailey* obviously are not in conflict with the decision below upholding the Commission's finding that, on the facts presented, fairness does not require inclusion of a withdrawal provision in the plan.

3. *No important federal question is presented.*

No novel or substantial questions of federal law are presented by these petitions. The Commission's statutory authority to modify its dissolution order is plain. The only issues of any possible consequence presented to the Commission were whether it should make the investment company plan subject to veto by one-third of the outstanding stock

and permit dissenting stockholders to withdraw their share of assets from the continuing company. The Commission, on the basis of its extensive experience with such questions and a full record, found that neither of such provisions was required by the "fair and equitable" standard of the Act. The Commission's determination involves an application of its special knowledge well within the area of discretion committed to it by Congress and long recognized by this Court, see *American Power & Light Co.* v. *S.E.C.*, *supra*, at 112; *S.E.C.* v. *Chenery Corporation*, et al., 332 U.S. 194, 207-9; *S.E.C.* v. *Central-Illinois Securities Corporation*, *supra* at 126-7. Petitioners have presented no persuasive grounds for judicial interference with the Commission's performance of its statutory duty.

The petitions likewise present no new or important question concerning the function of the District Court under the Act. In *S.E.C.* v. *Central-Illinois Securities Corporation*, *supra*, this Court established that the scope of District Court proceedings to enforce a Section 11(e) plan of reorganization is no broader than the review by a Court of Appeals on petition for review under Section 24(a) of the Act, and that the primary object of Section 11(e) was, as already noted, simply "to mobilize the judicial authority in carrying out the policies of the Act." Under Section 11(d) the Court's authority is invoked before rather than after the filing of plans in order to insure that compliance will go forward, but Section 11(d) does not give the Court any larger role in determining what is a fair and equitable plan than it has under Section 11(e). Section 11(d) specifies that the enforcement court may dispose of assets only "in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing." The fact that under Section 11(d) the Commission itself may propose a plan (which it did not do in this case) is

no reason for giving less weight to the Commission's approval of a Section 11(d) plan than one filed under Section 11(e).

Even if there were a basis for the contention that the District Court should make a *de novo* determination with respect to a plan to be enforced under Section 11(d), the issue is not one of such general importance as to merit consideration by this Court. This is the only proceeding which has been brought under Section 11(d) during the Commission's twenty years of administration of the Act and there is no prospect that there will be another Section 11(d) case. Indeed, the Commission's entire administration of the integration and simplification provisions of Section 11 of the Act is drawing to a close, see 21 SEC Ann. Rep. (1956) 51-75. IHES is one of the few remaining holding companies that has not completed compliance with the requirements of Section 11(b). Thus the case has very limited significance for the future administration of the Act.

Finally, petitioners present no issue of importance under the Investment Company Act of 1940. Their charges that supporters of the Interim Board plan have engaged in conduct which would have violated Section 36 of the 1940 Act (or its "spirit") were determined by the Commission to be wholly groundless, and were described by the Court of Appeals as not having sufficient merit to call for discussion (R. 916). The Commission found no evidence whatever that purchases of stock in the Company made by such persons were illegal or that they have any motives or interests in conflict with those of other stockholders (R. 867-8). The facts of record bear no resemblance to the investment company abuses discussed in the petitions. Moreover, IHES is still a registered holding company rather than an investment company so that the 1940 Act can have no application to the acts alleged.

Conclusion

The petitions for certiorari should be denied.

Respectfully submitted,

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JANUARY, 1957.

APPENDIX

Section 3(a)(5) of the Public Utility Holding Company Act, 15 U.S.C. § 79c(a)(5):

> (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this chapter, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—
>
> * * * * *
>
> (5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

Section 24(a) of the Act, 15 U.S.C. § 79x(a):

> (a) Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by

the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 626

CENTRAL-ILLINOIS SECURITIES CORPORATION AND C. A. JOHNSON, PETITIONERS

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BARTHOLOMEW A. BRICKLEY, TRUSTEE, SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 905) is reported at 237 F. 2d 839. The District Court issued no opinion but adopted as its findings of fact and

conclusions of law the Findings and Opinion of the Securities and Exchange Commission (R. 893). The Findings, Opinion and Order of the Commission (R. 847–879) have been published as Holding Company Act Release Nos. 13044 and 13083.

JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1956 (R. 916). The petition for a writ of certiorari in No. 626 was filed on December 13, 1956. The petition in No. 630 was filed on December 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

STATUTE INVOLVED

Relevant provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79, *et seq.*, are set forth in the Appendix, pp. 23–26, *infra*.

QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission has jurisdiction to modify a prior order for dissolution of a public utility holding company to permit its continued existence as an investment company, where the Commission's prior order has been reviewed and upheld by a court of appeals and submitted to a district court for enforcement, and where an application to modify the dissolution order was previously denied.

2. Whether there was an inconsistency between the Commission's basis for refusing to modify its dissolution order on a prior application and its action in this case.

3. Whether a plan of reorganization was not fair and equitable because stockholders were given neither

an opportunity to vote on the continuation of the enterprise nor the privilege of withdrawing.

STATEMENT

Petitioners seek review of a judgment of the Court of Appeals for the First Circuit affirming an order entered by the District Court for the District of Massachusetts on April 23, 1956. The order of the District Court enforced an order of the Securities and Exchange Commission approving a plan under Section 11 (d) of the Public Utility Holding Company Act of 1935 ("the Act"), 15 U. S. C. 79k (d), with respect to International Hydro-Electric System ("IHES"), a registered holding company under the Act.

IHES is a Massachusetts business trust organized in 1929. On the basis of market values, IHES has assets of at least $29,500,000, consisting of: cash or cash items of about $9,250,000; 313,701 shares (18.8%) of the outstanding common stock of Gatineau Power Company ("Gatineau"), a Canadian public utility company; 462,572 shares (4.6%) of the outstanding common stock of New England Electric System ("NEES"), a registered holding company; and all the common stock of Eastern New York Power Corporation ("ENYP"), the assets of which consist almost entirely of cash of about $3,000,000. The capital structure of IHES consists of 856,718 shares of $25 par value Class A stock which in effect is common stock (R. 850–851).

HISTORY OF THE PROCEEDINGS

On June 17, 1940, the Commission instituted a proceeding under Section 11 (b) of the Act to deter-

mine, among other things, what action was necessary to be taken by IHES to effect compliance with the corporate simplification standards of Section 11 (b) (2) of the Act. IHES then had five domestic subsidiaries: four New York electric utility companies, and New England Power Association ("NEPA"), itself the head of a large electric and gas holding-company system operating in New England, with numerous direct and indirect subsidiaries. It also controlled Gatineau, the Canadian public utility company. IHES then had outstanding 6% debentures, in principal amount of $26,568,000; 142,799 shares of $3.50 cumulative preferred stock, $50 par value; 856,718 shares of Class A stock, $25 par value; and Class B and common stocks.[1] The funded indebtedness of IHES was about equal to its assets, and IHES had not earned its total fixed charges since 1933. No dividends had been paid on its preferred stocks since 1934, and on its Class A stock since 1932.

In July 21, 1942, the Commission issued its Findings, Opinion and Order requiring that IHES be liquidated and dissolved. The Commission found that the IHES system consisted of four tiers of holding companies in contravention of the "great-grandfather" clause of Section 11 (b) (2); that IHES was merely a shell, performing no useful functions as a holding company; and that, on the facts then presented, "the continued existence of IHES as a holding company unduly and unnecessarily complicates

[1] By order of the Commission, issued in 1941, the Class B and common stocks were cancelled as worthless. *International Hydro-Electric System*, 8 S. E. C. 485 (1941).

the structure of the holding company system of which it is a part". *International Hydro-Electric System*, 11 S. E. C. 888, 904 (1942). The order of the Commission was affirmed on review in *Todd* v. *SEC*, 137 F. 2d 475 (C. A. 6).

In August 1943, the Commission, with the acquiescence of the management, filed an application in the District Court for the District of Massachusetts pursuant to Section 11 (d) of the Act to enforce compliance with its order of July 21, 1942. The District Court assumed jurisdiction over IHES and its assets and enjoined the debenture holders from enforcing their claims pending an orderly liquidation of IHES. In November 1944, the District Court appointed Bartholomew A. Brickley as Trustee of the estate of IHES, and he has continued in that capacity to the present time (R. 851).

The first major action by the Trustee was to prosecute, under the direction of the District Court, a suit against International Paper Company, the former parent of IHES. In 1947, as a result of this action, the Trustee recovered $19,000,000 in cash and used the proceeds to reduce the outstanding debentures of IHES to $18,197,600. In the meantime, NEPA had been reorganized under Section 11 (e) of the Act (changing its name to New England Electric System, or "NEES").[2] This reorganization reduced IHES' ownership of the common stock of NEES from 88% to 8%, and put the common stock on a dividend paying basis. This measure, and others, increased greatly IHES' dividend income.

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[2] *New England Power Association*, 22 S. E. C. 343 (1946).

In April 1949, the Trustee proposed a plan which provided for the retirement of the debentures, the allocation and distribution of the IHES assets among the preferred and Class A stockholders, and the dissolution of IHES. This plan was subsequently modified to incorporate a compromise agreement executed on March 26, 1953, between the two classes of stockholders with respect to the retirement of the preferred stock. The modified plan also provided for the election of a new board of directors of IHES to consist of nine members to represent the stockholders in formulating a definitive program for the modification of the 1942 dissolution order and the continuance of IHES as a closed-end non-diversified investment company registered as such under the Investment Company Act of 1940. (R. 852–853.)

The proposal to continue IHES in existence had this background: As early as 1948, Paul H. Todd, a director and then the largest stockholder of IHES as well as an active participant throughout the proceedings, had taken the position before the Commission that the situation of IHES had radically improved since the entry of the 1942 dissolution order; that most of the abuses and violations of the Act pointed out in the Commission's 1942 opinion had already been eliminated; that the stockholders would lose valuable tax advantages if IHES were dissolved; and that the dissolution order should be modified to permit IHES to continue in existence as an *exempt holding company*. This proposal was included in a plan upon which extensive testimony was taken, particularly with respect to the tax advantages which, it

was claimed, would enure to all the stockholders upon the continuance of IHES.[3] The Commission disapproved Todd's plan, finding that conditions, although much improved, had not so changed that a legitimately useful function from the viewpoint of Section 11 (b) of the Act had been imparted to IHES; and that "even if tax advantages of the type claimed by Todd could be permitted to affect our conclusion with respect to the requirements of Section 11 (b), the asserted tax advantages here do not appear to be of such a nature as to justify a modification of our dissolution order." *International Hydro-Electric System*, 30 S. E. C. 631, 647 (1949). On appeal by the Class A Stockholders Protective Committee, the Commission's order was affirmed. *Protective Committee* v. *SEC*, 184 F. 2d 646 (C. A. 2).

The debentures[4] and the preferred stock[5] were retired pursuant to Commission orders. The election of the new board of directors pursuant to the Trustees' Plan was held on April 27–28, 1954. A proxy contest developed between two factions, the so-called Todd-Jacobs group and the so-called Johnson-Romney group. Five candidates of the former

[3] The tax advantages would be derived from the sale of the high-cost NEES stock, which had a cost basis of over $30,000,000 in excess of its market value. This would permit IHES to pay for many years cash dividends which for tax purposes would constitute first a return of cost to the stockholders not taxable as ordinary income, and thereafter capital gains.

[4] *International Hydro-Electric System*, 29 S. E. C. 369 (1949), 30 S. E. C. 631 (1949), and 31 S. E. C. 529 (1950).

[5] *International Hydro-Electric System*, Holding Company Act Release No. 12193 (1953).

and four of the latter were successful on the face of the returns. The Johnson-Romney group challenged the election results before the District Court. The stalemate was broken by the District Court in its order of December 8, 1954, seating the nine candidates who were *prima facie* successful as an Interim Board of Directors with authority to formulate and present to the Commission and the District Court a definitive plan for the continued existence of IHES. The court's order likewise authorized other interested parties to file alternative plans for compliance with the objectives of the Act (R. 852–853). The proceedings with respect to the challenged election have not been pressed and are dormant, and the order of the District Court enforcing the plan affirmed by the court below provides for a new election (R. 893–896).

THE PROPOSED PLANS TO CONTINUE IHES AND THE PROCEEDINGS THEREON

In January 1955 the Interim Board filed its plan, under which IHES (to be renamed Abacus Fund) would obtain an exemption from the Act under Section 3 (a) (5)[6] and would continue as a closed-end investment company registered under the Investment Company Act of 1940, with minimal changes in the old Declaration of Trust (as to which no serious issue is now presented), and with restatement

[6] Section 3 (a) (5) of the Act provides that the Commission may exempt from the requirements of the Act a holding company which derives no material part of its income from a company or companies whose principal business within the United States is that of a public-utility company.

of its assets on a realistic basis geared to their present worth. New common stock would be issued to the Class A stockholders on a share-for-share basis. IHES would retain its interest in Gatineau, the Canadian public-utility company, and in ENYP (R. 346–348, 854–855, 859–860).

Johnson and his investment company, Central-Illinois, petitioners in No. 626, proposed a different plan ("Johnson plan"). This plan, as amended, during and after the close of the administrative hearing (R. 647, 803, 810, 856), provided that, subject to the assent of the holders of two-thirds of the Class A stock of IHES and to the right of withdrawal of dissenting stockholders, the interest of assenting stockholders would continue in either IHES or in a second company to be created. Both companies would be closed-end non-diversified investment companies registered under the Investment Company Act, and IHES would continue as a Massachusetts trust. If two-thirds of the Class A stock should not accept the plan, IHES would forthwith be liquidated (R. 855–856). Equity, petitioner in No. 630, did not submit a formal plan, but made a proposal similar to the Johnson plan (R. 52–54, 856).[7]

Hearings were duly held on the various plans. Elaborate testimony was taken, including the testimony of tax experts as to the tax effects of the several plans. No essential conflict developed as to the tax consequences, it being generally conceded that no

[7] The Class A Stockholders Committee also filed a plan, but did not oppose enforcement of the Interim Board's plan (R. 856, 892).

unfavorable tax results would occur under the Interim Board plan (R. 588–594, 870); that, under the Johnson and Equity plans, tax recitals pursuant to Part VI of Subchapter O of Chapter 1 of the Internal Revenue Code of 1954, would be required for the separated company to derive any benefit from the high-cost basis of its allocable shares of the NEES stock; and that such separated company would receive no tax benefits from IHES' capital loss carry-forward of approximately $887,000, or its accumulated earnings and profits deficit of some $4,250,000, which would remain with IHES (R. 208–236, 663–664, 870).

On November 23, 1955, the Commission issued its Findings and Opinion approving the plan filed by the Interim Board subject to some minor modifications, and holding that the 1942 dissolution order might properly be modified to permit the continuance of IHES as an investment company under the plan (R. 847–875). The Interim Board thereafter amended its plan to satisfy the Commission's objections and on January 13, 1956, the Commission approved the plan and modified its dissolution order of July 21, 1942, to permit IHES to consummate the Interim Board's plan, which the Commission found, pursuant to Section 11 (d) of the Act, fair and equitable and otherwise in conformity with the applicable provisions of the Act, and as appropriate for effectuating compliance with the corporate simplification standards of Section 11 (b) (2) (R. 876–879). For reasons stated the Commission also determined that the plan and proposal filed by petitioners herein could not be approved (R. 870–871, 877).

By Supplemental Application the Commission requested the District Court to approve and enforce the plan of the Interim Board (R. 880–887). Objections were filed by petitioners herein. After notice and hearing, the District Court, adopting the Commission's findings of fact and conclusions of law, approved and ordered enforced the Interim Board's plan (R. 891–899). The Court of Appeals affirmed.

ARGUMENT

Petitioners have tendered no question requiring review by this Court. The order of the Commission, affirmed by the district court and by the court below, is based on well established legal principles and settled administrative policy.

1. In the proceedings before the Commission, all the participants, including petitioners, desired and urged the continuation of the IHES enterprise in one form or another. Such a result required modification by the Commission of its dissolution order of 1942 and no one contended that it could not be done.[5] In fact, as we have seen, the 1953 compromise, to which petitioners in No. 626 were parties, was based on such continuation, and was advocated by both sides in the proxy contest (R. 862). Petitioners now urge, as they have done in the courts below, that the Commission lacked jurisdiction to modify its 1942 dissolution order without prior application to the Sixth Circuit which on review had affirmed the Commission's order in *Todd* v. *SEC*, 137 F. 2d 475 (C. A. 6).

[5] Although petitioner in No. 630 recognized that there was a question as to the Commission's jurisdiction (Pet. 19), the proposal presented by it was dependent upon the existence of jurisdiction.

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Section 11 (b), as noted by the court below (237 F. 2d at 843–844), is a complete answer to this argument. It expressly provides that the Commission may "revoke or modify any order previously" issued under Section 11 (b) if it finds that "the conditions upon which the order was predicated do not exist." There is nothing in the statute to suggest that the Commission's power to modify an order under Section 11 (b) (2) is any less or different after an order thereunder has been affirmed by a court of appeals. See also *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 121. The initial and primary responsibility, under Section 11 (b) rests with the Commission subject to direct review under Section 24 (a) of the Act—a course which, incidentally, petitioners have not pursued. In the light of the explicit language of Section 11 (b) the affirmance by the Sixth Circuit was merely a determination that the dissolution order was authorized by statute and was supported by substantial evidence in the record as it then stood.

That circumstances have substantially changed since 1942 is clearly established by the record in this case (see pp. 3–7, *supra*), and petitioners did not, and do not now, urge otherwise. Nor is there any question that a registered holding company may comply with the requirements of Section 11 (b) (2) by its transformation into an investment company. See *General Protective Committee* v. *SEC*, 346 U. S. 521, 530; *Downing* v. *SEC*, 203 F. 2d. 611, 622 (C. A. D. C.), certiorari denied, 346 U. S. 930.[9] Petitioners'

[9] See also *Utilities Power & Light Corporation*, 5 S. E. C. 483 (1939); *International Utilities Corporation*, 21 S. E. C. 283, 286–

jurisdictional argument rests on no more than the bare assumption that the relationship of the Commission to a reviewing court under Section 24 (a) of the Act is the same as that existing between a district court and a court of appeals, an analogy which this Court rejected in *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.[10]

The argument in No. 630 (Pet. 15, 18–19) that leave of the district court was essential in order to modify the Commission dissolution order seems to be premised, without expressly so stating, on the general doctrine that a tribunal first obtaining jurisdiction over a *res* acquires exclusive jurisdiction for its disposition. It overlooks the fact that the district court's jurisdiction was invoked under Section 11 (d) for the purpose of enforcing compliance with the Commission's order under Section 11 (b) (2). To the extent that circumstances have concededly changed to warrant modification of that order to permit compliance with Section 11 (b) (2) through a route other than dissolution, the district court's jurisdiction, as the court below observed (237 F. 2d at 844), "was not ousted but was continued to enforce the Commission's order as modified." It is particularly so in this case, since modification of the disso-

287 (1945); *Standard Power and Light Corporation*, Holding Company Act Rel. No. 13101 (1956).

[10] Petitioners rely upon *Bailey* v. *Proctor*, 166 F. 2d 392 (C. A. 1) which involved the power of a district court to modify its judgment after affirmance by the court of appeals. The court below, which had issued the *Bailey* v. *Proctor* decision, found no inconsistency in its present holding which dealt with the jurisdiction specifically granted to an administrative agency (237 F. 2d at 844).

lution order required no change as to any matters previously approved and enforced by the district court. On the contrary every previous step, such as the retirement of IHES' debt and preferred stock and the disposition of its interests in domestic utility subsidiaries, required for purposes of dissolution, was likewise essential for compliance with Section 11 (b) (2) through transformation of IHES into an investment company. Moreover, insofar as district court approval was essential, such approval, as noted by the court below (237 F. 2d at 844), was necessarily implicit in the court's order "approving and enforcing the interim board's plan for converting IHES into an investment company."[11]

[11] Petitioner in No. 626 (Pet. 16–17) states that in review and enforcement proceedings under Section 11 (d), unlike proceedings under Section 11 (e), the district court exercises *de novo* jurisdiction. No authority is cited in support of this novel reading of Section 11 (d), and, indeed, it is contrary to the provisions of Section 11 (d) itself. Section 11 (d) provides that the Commission issue an appropriate order under Section 11 (b), which is reviewable directly by the Court of Appeals. Thereafter, plans of compliance are to be formulated by the trustee or by any other interested person, including the Commission, and, following approval of an appropriate plan by the Commission, such plan is subject to enforcement by the district court. In these respects, enforcement proceedings under Section 11 (d) are no different from proceedings under Section 11 (e) involving plans for voluntary compliance submitted by the company for Commission approval and subsequently enforced by the district court, which under Section 11 (e) exercises only a reviewing function. The broad statutory purpose "was to enable the Commission, by giving it the authority to invoke the court's power, to mobilize the judicial authority in carrying out the policies of the Act. To do this the court 'as a court of equity' was authorized 'to take exclusive jurisdiction and possession of' the company or companies and their assets and to appoint a trustee to hold and administer the assets under the court's direction," *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 125.

2. Petitioner in No. 630 directly (Pet. 16–19) and petitioner in No. 626 inferentially (Pet. 14) contend, as they did below, that the Commission is foreclosed from considering the tax savings because in 1949 the Commission had denied a petition to modify the order of dissolution on the basis of the same factors and its order was affirmed in *Protective Committee* v. *SEC*, 184 F. 2d 646 (C. A. 2).[12] This is a complete misreading of the Commission's prior opinion. The Commission rejected that application, as noted in the instant opinon (R. 859, fn. 15), on entirely different grounds. At that time IHES still had outstanding some of its debentures and all of its preferred stock; there was no proposal to transform IHES into an investment company but rather to continue it as a *useless exempt public-utility holding company;* and on the basis of the record then before it the asserted tax benefits were uncertain and speculative, and it appeared that, if at all, they would benefit only some of the stockholders. Also, the sole basis of that application was that the alleged potential tax savings justified something less than full compliance with Section 11 (b) (2). The Commission emphasized that, while it would regard the easing of the tax burden as a relevant consideration, "so long as the choice does not result in frustrating the Act or in delaying the attainment of its objectives," it added that this was quite dif-

[12] In the administrative proceedings, petitioners' plan and proposal were expressly conditioned on obtaining a favorable tax ruling for the alleged purpose of conserving the tax benefits of IHES (R. 855–856).

ferent from making "the necessity *for compliance* turn on the tax consequences to individual security holders." *International Hydro-Electric System,* 30 S. E. C. 631, 643–644 (1949) (emphasis in original). Surely, the Commission is not precluded from granting an application, filed about seven years later, and modifying its order on the basis of "the drastically altered conditions of IHES on January 13, 1956" (237 F. 2d at 844)—the date of the present order—and approving a plan which fully meets the requirements of Section 11 (b) (2).

Petitioner in No. 630 (Pet. 18–19) also erroneously construes the Commission's opinion in the instant case as having determined that the dissolution order was modified for the sole purpose of preserving the tax advantages of IHES. Compliance with Section 11 (b) (2) via the investment company routes does not depend upon a showing of tax savings, and the Commission's approval of the Interim Board's plan was not based solely upon such tax savings. IHES now has a simple capital structure, consisting of Class A stock which under the plan will be converted into common stock on a share-for-share basis. IHES has ample liquid assets which can reasonably be employed in the customary business of an investment company. The Interim Board's plan, which the Commission approved, calls for changes in the Declaration of Trust designed to accord the stockholders more protection than they had initially (R. 871–874). There is also evidence, which the Commission and the courts below were free to accept, that as an investment company IHES can function in the best interests of the stock-

holders under a duly elected board of directors regardless of the present differences among its stockholders. The tax considerations are prominently featured in this case because they are germane to the question as to which plan will preserve to the greatest extent, and for the benefit of all security holders, the advantages which will be available if HHES continues as an investment company. The Commission found that the tax benefits are fully preserved under the Interim Board's plan, without any rulings by the tax authorities (R. 870), and there are substantial doubts as to whether such tax advantages could be retained by the alternative plan proposed by the petitioners (R. 208–36, 870).[13]

3. Finally, petitioners claim that the plan approved by the Commission was not fair and equitable, (a) because the question whether to continue the existence of HHES was not submitted to a vote of stockholders, and (b) because dissenters were not accorded withdrawal rights (No. 626, Pet. 14–15; No. 630, Pet. 36–40).

(a) The short answer to the first argument is that a plan for compliance with Section 11 (b) does not require stockholder approval. See *Phillips* v. *SEC*, 153 F. 2d 27 (C. A. 2), *certiorari denied*, 328 U. S. 860; *Application of SEC*, 50 F. Supp. 965, 966 (D. Del.). In the early years of its administration of Section 11, the Commission did not object to the voluntary inclusion of a provision for a stockholder vote, guided perhaps by statutory analogies under local

[13] The nature of the tax advantages and their consideration by the Commission are summarized in the Commission's findings and need not be detailed here (R. 857–859).

law. It soon became apparent, as the Commission noted in the instant case (R. 862), that this procedure proved a source of delay and led to collateral controversies unrelated to the Commission's statutory responsibility to secure compliance with Section 11 (b) "as soon as practicable". Accordingly, in later cases, the Commission not only refused to impose a voting requirement but even discouraged and disapproved provisions therefor when voluntarily incorporated in plans of compliance;[14] and in other cases the Commission approved plans for transforming public-utility holding companies into investment companies without requiring a vote.[15]

Moreover, as found by the Commission (R. 862) and as noted by the court below (237 F. 2d at 845), a stockholders' vote in the instant case would serve no useful purpose. The proposal to convert IHES into an investment company has been a matter of public knowledge since 1953. It was embodied in the compromise agreement of that year, and no stockholder has appeared in opposition thereto. The proxy contest in 1954 for the election of a board of directors of IHES, in which about 95% of all the outstanding shares were voted, "was carried out in an atmosphere

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[14] See *Commonwealth and Southern Corporation*, 21 S. E. C. 278, 280–281 (1945); *Kings County Lighting Company*, 24 S. E. C. 431, 452–453 (1946). See also *Application of SEC*, 50 F. Supp. 965 (D. Del.).

[15] *Electric Bond and Share Company*, Holding Company Act Release No. 11675 (1953); *Standard Power and Light Corporation*, Holding Company Act Release No. 13101 (1956). Both of these plans have been enforced by the appropriate district courts under Section 11 (e).

of continuation of IHES as an investment company," each of the contesting groups representing throughout that its objective was to convert IHES into an investment company. Further, the plan approved by the Commission is no bar to the ultimate liquidation of IHES. After the reorganization is completed, the stockholders, if they so wish, may exercise their franchise and cause the liquidation of IHES by an affirmative vote of two-thirds of the IHES stock, as provided in the Declaration of Trust (R. 534, 635).[16]

(b) The claimed right to withdrawal by dissenters is equally without merit. Petitioners claim no right of withdrawal under Massachusetts law or under the terms of the Declaration of Trust, and none exist (237 F. 2d. at 845). Nor do petitioners point to any such requirement in Section 11. As the court below observed, "many plans under Section 11 (b) which have been approved by the Commission and by the courts did not afford a right of withdrawal to dissenting stockholders, even where (as is not the case here) approval of such plans involved disregarding withdrawal rights existing under corporate charters." Indeed, as noted by the Commission (R. 864–865), under the bankruptcy reorganization statutes no withdrawal rights were provided for dissenters in order to avoid the necessity for cash payments to dissenters. The policy against withdrawal is also strongly reflected in

[16] It may be noted that under petitioners' plan a two-thirds vote would be required to continue the existence of IHES and that IHES would be dissolved if no such vote were obtained (R. 810, 812, 855). But under the Declaration of Trust an affirmative vote of two-thirds of the IHES stock is required for dissolution (R. 534, 635).

the Holding Company Act, which was designed to avoid forced liquidations by solvent companies and to assure that the process of compliance will yield to security holders the maximum realizable values. In the instant case, the Commission found that the Interim Board plan, which accords no withdrawal rights, will preserve the maximum values inherent in the IHES enterprise in harmony with the policy of the Congress (R. 870–871).

It is not suggested that a provision for withdrawal is *per se* unfair,[17] but to the extent that such a provision is discretionary there are good reasons to support the Commission's determination, affirmed by the courts below, against the demand for a right of withdrawal in this case. In the first place, no claim is made that dissenters be paid the cash value of their stock but rather that they be accorded a withdrawal in kind. As for themselves the record is clear that petitioners want no withdrawal as such but a splitting of the IHES enterprise and a transfer of their pro-

[17] In *The United Corporation*, 32 S. E. C. 378 (1951), the Commission approved a plan voluntarily providing for a withdrawal privilege. But in that case, as noted in the instant proceeding (R. 861), the Commission disclaimed any intention to intimate that such a provision was an essential element of fairness (32 S. E. C. at 387, note 16). Here, of course, petitioners claim a right of withdrawal as a matter of law, and that, absent such a provision therefor, a plan cannot be approved as fair and equitable.

portionate interest in IHES to a newly organized investment company subject to their control (R. 811, 815–816, 855–856). Such a withdrawal privilege is not accorded under appraisal statutes. Moreover, a privilege to withdraw, even when it is included, must also be appraised in the light of its effect upon the stockholders who remain in the enterprise. The Commission found that, in view of the present concentration of ownership of the IHES stock, large withdrawals would jeopardize the realization of the substantial tax advantages conserved by the Interim Board's plan and would make the successful operation of IHES as an inevstment company virtually impossible. For these and other reasons, the Commission concluded that the right to withdrawal must be denied (R. 868–870). Petitioner in No. 630 (Pet. 26–33) also contends that such concentration of ownership was largely the result of acquisitions by those to whom petitioners are opposed, and that such acquisitions were made in "secret" and in alleged violation of fiduciary principles and the statutes applicable to Investment Companies. The Commission found no basis for these contentions (R. 867–868), nor did the courts below. Thus there is no ground for review by this Court. *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The provisions of the Public Utility Holding Company Act of 1935, 48 Stat. 803, 15 U. S. C. 79 *et seq.* are in pertinent part as follows:

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

* * * * *

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

* * * * *

SEC. 11. * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-com-

pany system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceed-

ing for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(c) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after no-

tice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

SEC. 24 (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 626.

CENTRAL-ILLINOIS SECURITIES CORPORATION and C. A. JOHNSON,

Petitioners,

v.

BARTHOLOMEW A. BRICKLEY, TRUSTEE, SECURITIES AND EXCHANGE COMMISSION, et al.,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

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The briefs of respondents filed in opposition to the petition for certiorari in this case and to that in the companion case of *The Equity Corporation, Petitioner v. Bartholomew A. Brickley, et al., Respondents*, No. 630, base their contentions on a mistaken and prejudicial view of the proceedings.

Respondents, Interim Board of Directors and Lucinda Bunnen, et al., oppose the granting of the petitions by attacking the plan proposed before the Securities and Exchange Commission by the instant petitioners, on the assumption that that plan was before the District Court and the Court of Appeals and is now before this Court. But that plan was never before any court. The Commission disapproved petitioners' plan. In the same proceeding the Commission approved, subject to amendment, the plan pro-

posed by the Interim Board of Directors and conditionally approved an amendment to its then thirteen-year-old order of dissolution of International Hydro-Electric System. Petitioners acknowledge that the particular plan filed by them before the Commission has been foreclosed; and they have appealed only from the approval of the Interim Board plan, as amended at the suggestion of the Commission, and inexorably the new conditional order under Section 11(b) of the Public Utility Holding Company Act. As counsel for the Commission repeatedly stated in his argument before the District Court, had the petitioners sought an appeal from the order disapproving their plan, review would have been had directly pursuant to Section 24(a) of the Public Utility Holding Company Act to a court of appeals. The mistaken view that the Court had before it petitioners' plan was also adopted by the Court of Appeals (e.g., Pet. Cert. Case No. 626, Appendix A, p. 9a, lines 29-30, p. 10a, lines 33-35), to the prejudice of petitioners.

The present proceeding derives from the Commission's approval of a plan which provided for no vote of stockholders in a situation where stockholders had not voted for their management for thirteen years. The plan further provided for no right of withdrawal for the benefit of dissenting stockholders, although all plans filed in the proceeding, from the time that there had been any suggestion of a transformation of the company into an investment company, provided such a right and although stockholders of the holding company had every reason to believe that there would be such a right and although an orderly liquidation (implementing the Commission's order of dissolution) would have resulted in aliquot distribution of the fungible assets of the holding company.

Repeated references in the opposing briefs to a "veto" by one-third of the stockholders of IHES are, therefore, inappropriate. No such provision was before the District Court or the Court of Appeals, and no such provision is

presented to this Court. The issue is rather that a long standing order of dissolution was amended to effectuate a plan without safeguards which would make it fair and equitable. It is not, as opposing briefs prejudicially imply, the function of this Court to decide whether a majority vote, or a two-thirds vote, or a three-quarters vote, or a unanimous vote would be appropriate. It is not the function of this Court to determine precisely how a right of withdrawal would be implemented. And such questions are not now raised. It is, however, the function of this Court to determine as an important Federal question that, under the present circumstances in this reorganization involving millions of dollars, a plan is not fair and equitable which does not make provision for such a vote and such withdrawal rights.

The opposing briefs assert that a withdrawal provision would, in fact, be unfair to non-withdrawing stockholders since it might force them into a personal holding company situation with damaging tax consequences to them. The "damaging tax consequences" are simply the Commission's judgment that there would be unavailable extraordinary tax benefits hoped to be gained from the continuation of IIES, rather than its liquidation as contemplated by the order of dissolution. Whether the Commission and Courts are justified in making tax minimization a motivating factor in their administration of a Federal statute is doubtful; but it is not a matter of doubt that if there is any danger of damaging tax consequences as a personal holding company, it was Lucinda Bunnen, et al., who actively caused the situation to arise.

The more cogently opposing briefs argue the danger of a personal holding company situation, the more vulnerable becomes the Commission's ruling that the plan of the Interim Board is feasible.

Throughout the opposing briefs runs a thread as to the Commission's competence and expertise in these ad-

ministrative matters. As has been argued, most of the competence and expertise the Commission exhibited in this case were not those delegated to it by Congress, but were rather those of a kind of super tax arbiter.

On the question of *de novo* consideration, the Commission is content to attack a lack of authority with another lack of authority. Nowhere does it point out why the Section 11(d) cases should not be more analogous to Section 11(f) cases than to those under Section 11(e). Moreover, there remains uninterpreted and unexplained by the courts the anomalous administrative procedure whereby under Section 11(d) the Commission may propose (or adopt as its own) a plan of reorganization and then seek enforcement of that plan without substantial judicial review. This important question of Federal jurisdiction and of review has not been heretofore resolved. This lack of authority is not negated in any of the opposing briefs.

In fact, in this case there has been no review of any of the matters before the Commission. The Commission was specifically challenged to adduce in its brief and in its argument before the District Court the precise factual bases for its conclusions. Administrative bodies have continuously done so, see, *e.g.*, innumerable briefs of the National Labor Relations Board. The District Court, without examination of the evidence in the case, accepted the findings of the Commission, made no independent findings, but immediately stayed the proceedings without bond and without showing of irreparable harm and despite the contentions of the government and the present respondents; its actions hardly justify the conclusion that an independent review was obtained in the District Court and (although the government uses the precedent in another context and only as to one contention of petitioner in Number 630) hardly justify the application to the minutest degree of the majority doctrine in *Comstock v. Group of Institutional Investors*, 335 U. S. 211 (1948) (SEC Brief, p. 21).

CONCLUSION.

Opposing briefs have underlined the fact that there are in reality important Federal questions involved in this case concerned with millions of dollars of investors' capital and with the administration of two important Federal statutes. Upon the bases argued in the petitions for writ of certiorari in this case and in the companion case, the petitions should be granted.

Respectfully submitted,

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